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NTSB Order No. EA-3494

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 29th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

TERRY L. BLACKMAN,

Respondent.

Docket SE-9285

OPINION AND ORDER

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge John E. Faulk on June 22, 1989, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge reversed an order of the Administrator suspending for 60 days respondent's airline transport pilot certificate for his alleged violation of sections 91.90(b)(1)(i) and 91.9 of the Federal Aviation Regulations ("FAR"), 14 CFR Part

¹ That portion of the hearing transcript containing the initial decision and order is attached.

91.² We grant the appeal and affirm the 60-day suspension.

The issue in this case is a straightforward one: whether the Administrator, who has the burden of proof, met his burden of proving that respondent entered the Detroit Metro Airport TCA without permission. To show that respondent violated TCA airspace in piloting Cessna N59CC between Toledo, OH and Detroit City Airport, MI on May 11, 1987, the Administrator offered the testimony of three controllers who were involved in tracking respondent's flight. Each testified to tracking respondent's aircraft in the TCA. Tr. at pps. 17, 57, and 81-82. It was un rebutted that respondent had not obtained prior authorization to be in the TCA.

Respondent, on the other hand, claimed that the aircraft the controllers tracked could not have been his, as his route remained outside the TCA and was considerably away from the flight path they identified. He described in detail a wholly different route, and his testimony was confirmed by the copilot.

The law judge found the controllers' testimony credible. Tr. at p. 202. He made no specific finding as to respondent's credibility. Rather, he decided the case on burden of proof grounds. Despite finding the controllers' testimony credible, he

² As pertinent here, FAR section 91.90(b)(1)(i) (now see section 91.131) prohibits a person from operating an aircraft within a Terminal Control Area ("TCA") unless he has received prior authorization from air traffic control.

FAR section 91.9 (now 91.13(a)) prohibits a person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

dismissed the complaint based on the identification of three weaknesses that led him to conclude that the Administrator had failed to meet his burden of proof. First, the law judge noted that the only conclusive identification of N59CC occurred beyond the Detroit Metro TCA, after the alleged violation. Second, he cited discrepancies among the three controllers' written renderings of the Cessna's flight path. Third, he raised the possibility of instrument error in the controllers' altitude readings, respondent having offered evidence that the pilot's altimeter had been malfunctioning and could have reported erroneous altitudes.

As a burden of proof matter, the issue here is the weight to be given the various, sometimes conflicting, evidence. Having accepted the veracity of all three controllers' testimony, the law judge's decision against the Administrator was not based on issues of credibility or witness demeanor. Therefore, we need accord no special deference to the law judge's findings and may review the evidence de novo.³

We agree with the Administrator that the law judge's decision does not properly weigh the evidence. The preponderance of the evidence we believe clearly supports the Administrator's order finding that respondent violated sections 91.90(b)(1)(i)

³ Accord Administrator v. Wolf, NTSB Order EA-12159 (1991), where we reversed the initial decision and affirmed the Administrator's order on concluding that the law judge's factual findings could not be reconciled with the evidence. See also Administrator v. Schneider, 1 NTSB 1550 (1972) (in making factual findings the Board is not bound by the examiner's findings).

and 91.9. More specifically, and for the reasons discussed below, we find that the three reasons cited by the law judge for his refusal to rely on the testimony adduced by the Administrator were inadequate.

As noted, the law judge stated his belief in the veracity of the controllers' testimony. Although that testimony placed respondent directly in the TCA (without permission), the law judge nevertheless discounted it in part because each controller's diagram of respondent's flight path was somewhat different. We find that the discrepancies were inconsequential, and that this factor was not a proper basis to dismiss the charges on burden of proof grounds.

In no case did any of the three diagrams show a flight path entirely outside the TCA, and the diagrams were substantially similar (considering that the controllers did not have identical geographic areas of responsibility). Indeed, Exhibit A-6 (the drawing by the third controller, Mr. Pollard) picks up approximately where Exhibit A-4 (the drawing of the path monitored by the prior controller, Ms. Kochan) left off. We also agree with the Administrator that one would not expect the three drawings to be absolutely identical.⁴

⁴ For example, Exhibit A-4 initially had a slightly more easterly flight path. However, it was revised at the hearing; the witness explained that she had not seen or used that map before using it to track respondent's path. Tr. at pps. 56-57.

Exhibit A-6 shows a somewhat irregular path, but this also was explained in the record. East Arrival Controller Pollard had assumed that respondent sought to land at Detroit Metro rather than
(continued...)

As grounds for his decision that the Administrator did not meet his burden of proof, the law judge also pointed to the Administrator's failure to identify N59CC when in the TCA. Although mistaken identification can occur, we believe the evidence overcomes any reasonable possibility of it here. The controllers communicated with each other and tracked the aircraft continually -- through to the point at which it was identified.⁵ There is absolutely nothing in the record that would even suggest a case of mistaken identity, i.e., that there was another aircraft in the same position at any time, either during the tracking or at the point of ultimate identification. See Administrator v. Gilman, NTSB Order EA-3447 (1991) at pages 3-4 ("[T]he theory that there may have been more than one aircraft has nothing in the record to support it and three controllers watching their radar screens to refute it."). See also Administrator v. Strock, 4 NTSB 349 (1982), in which a TCA incursion was found based on very similar evidence.

⁴(...continued)
Detroit City Airport. As a result, the controller issued and respondent followed certain instructions that contemplated a landing at Detroit Metro. Those instructions were amended and respondent's path changed once Mr. Pollard learned of the intended destination. Tr. at pps. 90-92.

⁵ The un rebutted testimony demonstrates that no other aircraft squawking the 1200 beacon code being used by respondent were in the vicinity at the time so as to interfere with identification. The North Feeder Controller testified that he saw the 1200 beacon code on this aircraft at the same time it was identified as N59CC and tagged by the East Arrival Controller. Tr. at p. 16. The East Arrival Controller also testified that the aircraft being tracked and the aircraft identified as 59CC and issued a new beacon code were one and the same. Tr. at pps. 81-85.

Finally, we cannot agree with the law judge's third reason for rejecting the Administrator's proof -- testimony that the pilot's altimeter had produced faulty readings in the past, and could have done so here at any point in the flight. This testimony does not, in our view, outweigh the other evidence of record supporting the charges. We note especially that the documented altitude errors (see Exhibit R-2) were a maximum of 400 feet deviation. In this case, the Administrator alleged, and the controllers testified, that respondent's aircraft violated the TCA from approximately 7,500 feet down to 3,000 feet. This degree of disparity cannot be explained based on prior 400-foot altimeter errors.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The order of suspension is affirmed; and
3. The 60-day suspension of respondent's ATP certificate shall begin 30 days from the date of service of this order.⁶

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶ For the purposes of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR section 61.19(f).